

ENVIRONMENTAL PROTECTION COMMISSION[567]

Adopted and Filed

Pursuant to the authority of Iowa Code sections 455B.131, 455B.133, 455B.134, and 455B.152, the Environmental Protection Commission hereby amends Chapter 22, “Controlling Pollution,” and Chapter 33, “Special Regulations and Construction Permit Requirements for Major Stationary Sources—Prevention of Significant Deterioration (PSD) of Air Quality,” Iowa Administrative Code.

The purpose of the adopted amendments is to ensure that sources of greenhouse gas emissions in Iowa are regulated in the same manner and at the same levels as specified in new federal regulations for greenhouse gases, the Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas Tailoring Rule (Tailoring Rule).

Notice of Intended Action was published in the Iowa Administrative Bulletin (IAB) on August 11, 2010, as **ARC 8999B**. A public hearing was held on September 13, 2010. The Department did not receive any comments at the public hearing. The Department received ten sets of written comments before the close of the public comment period on September 14, 2010. The submitted comments and the Department’s response to the comments are summarized in the public responsiveness summary available from the Department. The Department did not make any changes to the adopted amendments from those published under Notice.

On April 2, 2007, the U.S. Supreme Court found that greenhouse gases, including carbon dioxide, are air pollutants covered by the Clean Air Act (*Massachusetts v. EPA*, 549 U.S. 497). The Court found that the U.S. Environmental Protection Agency (EPA) was required to determine whether emissions of greenhouse gases from new motor vehicles cause or contribute to air pollution, which may reasonably be anticipated to endanger public health or welfare, or whether the science is too uncertain to make a reasoned decision.

In April 2009, EPA responded to the Court by proposing a finding that greenhouse gases contribute to air pollution that may endanger public health or welfare. On December 7, 2009, EPA issued two distinct findings regarding greenhouse gases, as follows:

1. Endangerment Finding: EPA found that the current and projected atmospheric concentrations of the six key, well-mixed greenhouse gases that include carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆) threaten the public health and welfare of current and future generations; and
2. Cause or Contribute Finding: EPA found that the combined emissions of these well-mixed greenhouse gases from new motor vehicles and new motor vehicle engines contribute to greenhouse gas pollution, which, in turn, threatens public health and welfare.

These findings, which were published December 15, 2009, did not impose any requirements on industry or other entities. However, these findings were a prerequisite for finalizing the greenhouse gas standards for light-duty vehicles and for setting a schedule to regulate greenhouse gases from stationary sources.

On March 29, 2010, EPA completed its reconsideration of the December 18, 2008, memorandum entitled “EPA’s Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program,” often called “the Johnson memo.” The final action confirmed that any new pollutant that EPA may regulate becomes covered under the PSD program on the date when the EPA rule regulating that new pollutant takes effect. This action clarified that, for greenhouse gases, the date of PSD program coverage will be January 2, 2011, the date the light-duty vehicle rule is expected to take effect.

On April 1, 2010, EPA finalized the light-duty vehicle rule controlling greenhouse gas emissions. This rule confirmed that January 2, 2011, is the earliest date that a 2012 model year vehicle meeting these rule requirements may be sold in the United States. On that date, Clean Air Act permitting program requirements will apply to stationary sources of greenhouse gases.

On May 13, 2010, EPA issued the final Tailoring Rule that establishes EPA's approach to addressing greenhouse gas (GHG) emissions from stationary sources under Clean Air Act permitting programs. EPA published the final Tailoring Rule in the Federal Register on June 3, 2010.

The Tailoring Rule for GHG emissions sets thresholds that specify when permits under the PSD and Title V programs are required for new and existing facilities. The Tailoring Rule tailors the requirements of these permitting programs to limit which facilities will be required to obtain PSD and Title V permits. The Tailoring Rule establishes a schedule that will initially focus air permitting programs on the largest sources that are already subject to PSD and Title V requirements. The Tailoring Rule then expands to cover the largest sources of GHG emissions that may not have been previously covered by the PSD or Title V permitting program for other pollutants.

EPA estimates that facilities responsible for nearly 70 percent of the national GHG emissions from stationary sources will be subject to PSD and Title V permitting requirements under the Tailoring Rule, including the nation's largest GHG emitters, such as power plants, refineries, and cement production facilities, as well as other large industrial or commercial emitters. GHG emissions from smaller industrial or commercial facilities will not be covered by the PSD or Title V programs at this time.

The PSD and Title V emissions thresholds for criteria pollutants such as fine particulate, sulfur dioxide and nitrogen dioxide are 100 and 250 tons per year (tpy). EPA has determined that while these thresholds are appropriate for criteria pollutants, they are not feasible for GHGs because GHGs are emitted at much higher levels.

Through the Tailoring Rule, EPA will phase in the GHG permitting requirements in two initial steps outlined below, followed by assessment and rule making to phase in appropriate, additional requirements for controlling GHG emissions from stationary sources.

Step 1 (January 2, 2011, to June 30, 2011): Effective January 2, 2011, only sources currently subject to the PSD permitting program (i.e., sources that are newly constructed or modified in a way that significantly increases emissions of a pollutant other than GHGs) would be subject to permitting requirements for their GHG emissions under the PSD program. For these projects, only GHG increases of 75,000 tpy or more of total GHG (based on potential to emit (PTE) and using a specific formula to calculate "tpy CO₂ equivalent emissions (CO₂e)" as defined in the Tailoring Rule) would be subject to PSD for GHG emissions.

Similarly, for the Title V program, only sources currently subject to the program (i.e., newly constructed or existing major sources for a pollutant other than GHGs) would be subject to Title V requirements for GHG.

During this time, no sources would be subject to PSD or Title V permitting requirements due solely to GHG emissions.

Step 2 (July 1, 2011, to June 30, 2013): In this phase, PSD permitting requirements will, for the first time, cover new construction projects with a GHG PTE of at least 100,000 tpy CO₂e even if the projects do not exceed the permitting thresholds for any other pollutant. Modifications at existing facilities that increase their GHG PTE by at least 75,000 tpy CO₂e will be subject to permitting requirements, even if the modifications do not significantly increase emissions of any other pollutant.

In Step 2, Title V operating permit requirements will, for the first time, apply to sources based on their GHG emissions even if the requirements would not apply based on emissions of any other pollutant. Facilities with a GHG PTE of 100,000 tpy CO₂e or more will be subject to Title V permitting requirements.

In the Tailoring Rule, EPA commits to undertake another rule making to begin in 2011. The federal rule making will request comments on an additional step for phasing in GHG permitting and may discuss whether certain smaller sources can be permanently excluded from permitting. EPA states that it will not require permitting for smaller sources (those with a GHG PTE below 50,000 tpy) until at least April 30, 2016.

EPA indicates in the Tailoring Rule that EPA will complete a study by the end of April 2015 on remaining GHG permitting burdens that would exist if EPA applied permitting requirements to smaller sources. EPA states that it will complete a rule by April 30, 2016, further addressing permitting for these

facilities. EPA may decide that successful streamlining will allow the phase-in of more sources. EPA may also decide that certain smaller sources need to be permanently excluded from GHG permitting.

This rule making amends the state's Title V and PSD air quality rules for GHG emission regulation so that the state rules match the federal Tailoring Rule (see references to the corresponding federal amendments in the item statements below).

Items 1 and 2 amend the definitions applicable to the Title V Operating Permit (Title V) program. In combination, these two amendments codify the limited conditions under which greenhouse gases are subject to Title V regulation.

Title V requires that an affected facility obtain a Title V operating permit. The Title V operating permit, which is renewed every five years, contains all air emission control requirements that apply to the facility, including the requirements established through construction permitting.

Item 1 amends the definition of "major source" in rule 567—22.100(455B) to add the Title V term "subject to regulation." This change is identical to the amended definition in the final federal Tailoring Rule (see 40 Code of Federal Regulations (CFR) 70.2, definition of "major source," as amended on June 3, 2010).

Item 2 amends rule 567—22.100(455B) to add the definition of "subject to regulation." The definition includes definitions for "greenhouse gases (GHGs)" and "tpy CO₂ equivalent emissions (CO₂e)" and further specifies the Title V applicability criteria for stationary sources of GHG emissions. The definition matches the new federal definition in the Tailoring Rule (see 40 CFR 70.2, definition of "subject to regulation," as amended on June 3, 2010).

Beginning January 2, 2011, power plants, industrial facilities, ethanol plants, state universities, municipal utilities, and other facilities in Iowa that are already considered major sources under the Title V program will be affected under the amendments.

The approximately 280 facilities that are currently subject to the Title V program have already been required to report GHG emissions under Iowa statutes and administrative rules. As these facilities apply for, renew or modify their Title V permits, they must address GHG requirements, such as calculating and reporting GHG emissions using the CO₂e methodology, and any other applicable requirements.

Beginning on July 1, 2011, additional sources of GHG emissions, such as ethanol plants, municipal utilities, some hospitals, and some larger landfills, will be classified as major sources under Title V.

The Department estimates that 65 additional facilities will become subject to Title V on July 1, 2011. These facilities will need to apply for a Title V permit by July 1, 2012. However, it is expected that at least one third of these 65 newly affected facilities (over 20 facilities) may already have, or may be able to take, enforceable limits in construction permits, such as limits on hours of operation or limits on production throughput, that would potentially reduce GHG emissions below the applicable Title V thresholds.

The amendments do not make any changes to the rules for Title V fees. At this time, owners or operators of Title V facilities are not required to include GHG emissions in calculating their Title V fee payments.

The Department received several comments regarding Title V fees. In general, the comments stated that the amendments as proposed in the Notice were not clear on whether Title V fees would be assessed on greenhouse gas emissions and that the Department should revise the final rules to clarify that greenhouse emissions are not included in Title V fee calculations.

These comments are addressed in detail in the public responsiveness summary. In summary, if the Department were to amend the definitions as suggested by the commenters, this would result in state regulations that do not match federal regulations and could result in EPA's disapproval of Iowa's implementation of the federal regulations.

EPA's preamble to the final, federal Tailoring Rule states that EPA is not addressing Title V fees for greenhouse gas emissions at this time. However, EPA recommends "that each program review its resource needs for GHG-emitting sources and determine if the existing fee approach will be adequate."

EPA's recommendation is in keeping with the Department's annual process for establishing the Air Quality Bureau budget and for setting the Title V fee. As part of this annual process, the Department holds several meetings for Title V fee payers and other stakeholders to discuss the budget and Title V

fees. In addition to reviewing and discussing the reasonable costs to administer the Title V program, mechanisms for funding the air quality program are discussed each year, such as a fee for construction permits. The Department will continue to undertake a transparent and public process for developing the air quality budget and Title V fees.

Items 3 and 4 amend the definitions applicable to the PSD program. In combination, these two amendments codify the limited conditions under which greenhouse gases are subject to PSD program regulation.

New source review (NSR) is a federal term for review and preconstruction permitting of new or modified stationary sources of air pollution. The PSD program is a component of NSR that includes procedures to ensure that air quality standards are maintained. In general, the PSD program requires that an affected facility obtain a PSD permit specifying how the facility will control emissions. The permit requires the facility to apply Best Available Control Technology (BACT), which is determined on a case-by-case basis taking into account, among other factors, the cost and effectiveness of the control.

Item 3 amends subrule 33.3(1) to revise the definition of “regulated NSR pollutant” to clarify that the term “subject to regulation” is now specifically defined for the PSD program. Additionally, language is moved from paragraph “4” to new paragraph “5.” This change matches the amended definition in the final federal Tailoring Rule (see 40 CFR 52.21(b)(50)(iv) and 52.21(b)(50)(v), as amended on June 3, 2010).

Item 4 amends subrule 33.3(1) to add the definition of “subject to regulation” for the PSD program. The definition matches the final federal definition in the Tailoring Rule (see 40 CFR 52.21(b)(49), as amended on June 3, 2010). The definition includes definitions for “greenhouse gases (GHGs)” and “tpy CO₂ equivalent emissions (CO₂e)” and also specifies the methodology for calculating an emissions increase for GHGs, the applicable thresholds for GHG emissions, and the schedule indicating when the applicability thresholds take effect.

Starting January 2, 2011, facilities already subject to PSD and that also meet the threshold levels for GHG emissions will be impacted. A facility will be subject to PSD permitting requirements if the facility is a new major stationary source for a regulated NSR pollutant that is not a GHG and also will emit or has the potential to emit 75,000 tpy CO₂e; or if the facility is an existing major stationary source for a regulated NSR pollutant that is not a GHG, will have an emissions increase of a regulated NSR pollutant, and will have an emissions increase of 75,000 tpy CO₂e.

In any given year, the Department receives approximately 5 to 20 PSD project applications. The specific nature of the project will determine if it is subject to PSD requirements for GHGs. The Department expects very few projects to be affected by the new threshold levels for GHG emissions during this first phase.

Beginning July 1, 2011, a facility will be subject to PSD permitting requirements if the facility is a new stationary source that will emit or has the potential to emit 100,000 tpy CO₂e; or if the facility is an existing stationary source that emits or has the potential to emit 100,000 tpy CO₂e and when such stationary source undertakes a physical change or a change in the method of operation that will result in an emissions increase of 75,000 tpy CO₂e or more.

As noted above, the Department receives approximately 5 to 20 PSD project applications each year. The specific nature of the project will determine if it is subject to PSD requirements for GHGs. Additionally, the Department expects that many new or existing facilities may already have, or may be able to take, enforceable limits in construction permits, such as limits on hours of operation or limits on production throughput, that would potentially reduce GHG emissions below the applicable PSD thresholds.

The Department received several comments regarding the PSD program requirements for BACT for greenhouse gases. The commenters expressed concern that EPA had not yet issued BACT guidance for greenhouse gases. The commenters recommended that establishing BACT standards or guidance should be a high priority for the Department and that stakeholders should be included in the BACT guidance development.

These comments are addressed in detail in the public responsiveness summary. In summary, EPA’s BACT guidance for GHG emissions is meant to assist state agencies in their BACT determinations.

The newly issued GHG BACT guidance will serve as additional guidance for already-established PSD regulations and guidance. Using EPA's guidance will help to ensure national consistency in BACT determinations. As in the past, the Department will establish BACT on a case-by-case basis for each individual PSD project. The Department is confident that it will be able to work with each affected facility to establish BACT for GHG emissions.

Several commenters recommended that the Department place a provision in the Adopted and Filed rules to allow for automatic nullification or rescission if the federal Tailoring Rule were to be vacated. These comments are addressed in detail in the public responsiveness summary.

In summary, the Department's response to these comments is as follows:

The Iowa Administrative Procedure Act, Iowa Code chapter 17A, specifies how state agencies, including the Department, must undertake rule makings. An important component of the required procedures includes public notice and opportunity for public participation. This opportunity for public involvement would be circumvented with an automatic rescission/nullification provision in the final rules and would be in violation of the Iowa Code requirements.

Additionally, Iowa Code section 455B.133 establishes the Environmental Protection Commission, the decision-making body for the Department of Natural Resources, Environmental Services Division. The Commission's authority and additional public input would be eliminated if the final rules provided for automatic rescission or nullification. Further, Iowa Code chapter 17A provides for General Assembly review of all rule makings by the Administrative Rules Review Committee (ARRC). ARRC's review would also be removed from the rule-making process by including an automatic rescission/nullification provision.

The Department cannot reasonably anticipate all possible federal actions related to greenhouse gases and how these actions would affect the federal Tailoring Rule. It would be nearly impossible and highly impractical for the Department to describe each possible federal action in the final rules and further describe the corresponding effect to the state rules. Attempting to do so would likely provide even more regulatory uncertainty for the Department and for regulated entities.

The Iowa Administrative Procedure Act, Iowa Code chapter 17A, provides several remedies in the event of legal or other federal actions to the federal Tailoring Rule or to related federal greenhouse gas provisions. Iowa Code chapter 17A sets forth specific provisions under which a state agency may conduct "emergency" rule making. The Department believes that a full or partial vacatur of the federal Tailoring Rule regulations would certainly meet the requirements for "emergency" rule making. The options allowed under "emergency" rule making would significantly shorten the rule-making schedule and allow the Department to react to the changes in federal regulations relatively quickly. Additionally, Iowa Code chapter 17A states that "An interested person may petition an agency requesting the adoption, amendment or repeal of a rule." This provision would allow a concerned party to implore the Department to undertake rule making if the federal Tailoring Rule or other related federal greenhouse gas regulation is repealed.

The Department may also choose to grant waivers or variances of the state's adoption of vacated federal regulations.

Several commenters recommended that the Department suspend finalizing the air quality amendments until the numerous legal challenges to the Tailoring Rule and other federal actions related to greenhouse gases and the Tailoring Rule are completed.

These comments are addressed in detail in the public responsiveness summary. In summary, it is not uncommon that EPA regulations are challenged through administrative or legal means. While some challenges are upheld by the courts, resulting in a remand or stay of the federal regulations, some EPA regulations are also upheld by the courts. Many of these legal challenges take years to resolve. Consequently, the Department cannot wait to undertake rule makings until the appeals to federal regulations run their course. Iowa's EPA-approved State Implementation Plan (SIP) and Iowa statute obligate the Department to ensure that the Clean Air Act is implemented and that citizens have air quality that is protected and maintained to the greatest extent possible.

Without these amendments, GHG emission sources would be subject to the current Title V and PSD applicability thresholds of 100 tpy and 250 tpy, which the Department estimates would subject 61,000 facilities in Iowa to Title V permitting and 410 facilities to PSD permitting.

As with other federal air quality regulations, EPA may exercise its federal authority over states that do not implement federal air quality regulations. EPA indicates that it plans to take immediate action in states that fail to apply the GHG thresholds in the Tailoring Rule to the states' Title V and PSD programs by January 2, 2011. To avoid these consequences, the Department is proceeding with the rule making so that the adopted amendments will be in effect prior to January 2, 2011, and Iowa may continue to manage the PSD and Title V programs under state authority.

These amendments are intended to implement Iowa Code section 455B.133.

These amendments will become effective on December 22, 2010.

EDITOR'S NOTE: Pursuant to recommendation of the Administrative Rules Review Committee published in the Iowa Administrative Bulletin, September 10, 1986, the text of these amendments [22.100, 33.3(1)] is being omitted. These amendments are identical to those published under Notice as **ARC 8999B**, IAB 8/11/10.

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